In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1941

No. 777

MCLAUGHLIN LAND AND LIVESTOCK COMPANY (a corporation),

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a corporation),

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION FOR THE RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

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BRIEF IN OPPOSITION FOR THE RESPONDENT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 206-208) is reported in 122 Fed. (2d) 193.

The judgment and decree of dismissal of the United States District Court for the Northern District of California is in the record at page 126.

STATEMENT OF THE CASE.

Petitioner's complaint is that it was precluded by the court below in showing that it was the owner of approximately 7000 acres of real property listed in its schedules. This is a misstatment of the facts, as will presently appear. This complaint is predicated upon the fact that petitioner was in the possession of the real property and therefore the Bankruptcy Court had summary jurisdiction to determine title, which it failed to do. This is another misstatement of the facts. 6640 acres of land are described in the schedules, and the fact is that the petitioner voluntarily surrendered all but 600 acres of the land to respondent, hereinafter for convenience called Bank, immediately after a foreclosure sale which was held on March 28, 1932, and, in fact, disclaimed any interest to said land in a suit subsequently commenced by Bank. Petitioner did not possess any of the 600 acres after the foreclosure until December 1, 1938, which was after the termination of an oral seven-year lease given to the stockholders and officers of petitioner by the Bank. On the last mentioned date petitioner took possession of the 600 acres from its stockholders, directors and officers for the sole purpose of re-litigating the question of the validity of the foreclosure sale which was held more than seven years previous thereto.

Throughout its petition for certiorari and in the brief in support thereof, petitioner claims that the court below should have determined the issue of title to the 6640 acres of property listed in its schedules, inasmuch as title was not involved in and had

not been decided in any other case. This is another gross misstatement of the facts and is contrary to its pleading in the court below (R. 40). Too, the fact is that the court below did decide the question of title. It held that petitioner had no interest in the property and in fact was trespassing thereon. Petitioner's only semblance of a claim to the property is that the foreclosure proceedings leading up to the foreclosure sale which was held on March 28, 1932, were defective in certain particulars (R. 37-38). That issue—whether the foreclosure proceedings were regular in all respects and the foreclosure sale actually held—has been determined in four separate proceedings, all of which were decided before this proceeding was instituted. One of those four proceedings directly involved the question of title, being a direct attempt by petitioner to quiet its title to the property by way of a cross-complaint, and in a fifth proceeding petitioner commenced an action against Bank seeking to quiet title to the property.

Petitioner's sole complaint before the District Court was that no hearing was held before the Special Master and that the recommendation of the dismissal was made solely upon the stipulation entered into by counsel for petitioner, counsel for Bank, and counsel for certain unsecured creditors, wherein the parties stipulated that the Bank's petition should abide the appeals taken by the petitioner from two judgments rendered against it in the State Court.

This contention was completely devoid of merit, inasmuch as there had been a full hearing before the

Special Master, and petitioner had actually introduced evidence in opposition to the petition filed by the Bank. Consequently, petitioner has abandoned this contention in its petition for certiorari.

After the District Court had dismissed these proceedings, petitioner filed an action to quiet title to the property in the State Court. Judgment was rendered in favor of the Bank, which judgment has become final. A certified copy of the judgment roll in this latter action was filed with the Circuit Court.

We feel that a brief chronological history of the facts and litigation will be helpful to the court.

STATEMENT OF THE FACTS.

On March 17, 1931, the petitioner and one William Brinan made, executed and delivered a promissory note to the Bank in the sum of $173,800.00, and as security for said note petitioner conveyed 6640 acres of land to Corporation of America, as trustee for Bank. Petitioner defaulted under the note, and the property was foreclosed on March 28, 1932. A trustee's deed was thereupon executed, delivered and recorded (R. 54, 55).

Immediately following the sale, *petitioner surrendered possession of all but 600 acres of the property to the Bank, and the Bank has paid all taxes on the land since the foreclosure sale* (R. 47, 186-187, 189). The stockholders of appellant remained in possession of the remaining 600 acres for over seven years by virtue of an oral seven-year lease (*Bank of America*

v. McLaughlin Land & Livestock Co., 40 Cal. App. (2d) 620, 105 P. (2d) 607; *Bank of America v. McLaughlin,* 37 Cal. App. (2d) 415, 99 P. (2d) 548).

Ever since 1932 the Bank has been attempting to obtain possession of the remaining 600-acre parcel, and, as petitioner so aptly states, a considerable amount of litigation has ensued. The following is a brief statement of that litigation.

On May 27, 1932, the Bank commenced an action in unlawful detainer under the provisions of section 1161a of the Code of Civil Procedure of the State of California, which provides for the remedy after foreclosure under a mortgage or deed of trust, and sought possession of the entire 6640 acres covered by the deed of trust. The petitioner, in its answer in that case, *admitted the regularity of the foreclosure proceedings and the validity of the foreclosure sale* (R. 55-56; 189; *Bank of America v. McLaughlin Land & Livestock Co.,* 40 Cal. App. (2d) 620, 105 P. (2d) 607) *and disclaimed as to all but 600 acres* (R. 189). It set up as an affirmative defense that the Bank had given it and its stockholders and officers, members of the McLaughlin family, an oral seven-year lease to 600 acres of the property. *No claim was made as to the remaining 6040 acres of property* (R. 186-187, 189). The jury found for petitioner in that case and judgment was entered accordingly.

In April, 1933, H. H. Bechtel, as assignee of the Bank, brought an action for the balance due on the note for $173,800.00, which was originally secured by the deed of trust. The petitioner answered and

pleaded payment. The case was tried on November 13, 1933, petitioner being represented in court by counsel and its president (R. 191-192). On November 20, 1933, findings of fact and conclusions of law were made by the court, and a deficiency judgment was entered in favor of Bechtel. That judgment has become final (R. 56-57).

On July 11, 1933, the Bank commenced a second unlawful detainer action, under the provisions of section 1161 (1) C. C. P. This action involved only the 600-acre parcel claimed by the petitioner and its stockholders as lessees in the original unlawful detainer action and was prosecuted on the theory that the tenancy of the appellant and its stockholders had terminated. In that case, *petitioner denied that it was in possession of any part of the property and claimed that the oral seven-year lease was made between the Bank and petitioner's stockholders as individuals.* In other words, petitioner, contrary to its verified answer in the first unlawful detainer action, pleaded that it was not a party to that lease. The answer filed by the defendants in the second unlawful detainer action further pleaded that the judgment in the first unlawful detainer action was *res judicata* (R. 57-58), which defense was ultimately affirmed by the State Court (*Bank v. McLaughlin*, 22 Cal. App. (2d) 411, 71 Pac. (2d) 291, 72 Pac. (2d) 554).

During the pendency of the last case petitioner filed a petition under section 75 of the Bankruptcy Act. In its original schedules *petitioner listed no real estate* and claimed it was a lessee of certain of the real property involved herein (R. 187-188). Note

that at this point petitioner had reverted to the claim in the first unlawful detainer case that it was a party to the lease. It was not until it filed its second amended schedules that petitioner for the first time listed as an asset all the real property originally covered by the deed of trust. The Bank filed a motion to dismiss those proceedings on the grounds that (1) the petitioner was not a farmer; (2) that the Bank was the owner of the real property listed in the second amended schedules by virtue of the trustee's sale; (3) that the petitioner was estopped from attacking the validity of the foreclosure proceedings by virtue of (a) its laches, (b) the judgment in the deficiency action being *res judicata,* (c) section 338, subd. 4 C. C. P., and on other grounds not here material. The petitioner answered and pleaded that the first unlawful detainer case was *res judicata;* that no trustee's sale was actually conducted; and that the person actually conducting the sale was not authorized to do so (R. 58-59).

The petition to dismiss was referred to a special master for hearing and report, which special master conducted a protracted hearing on the issues raised and found each of the contentions of the Bank set forth hereinabove to be true and decided all matters pleaded in the answer of the petitioner, hereinabove set forth, against it; in other words, the special master found that the Bank was the owner of all the property described in the deed of trust and that the foreclosure proceedings were regular and that the trustee's sale had actually been conducted (R. 59-60).

The District Court approved the report of the special master and dismissed the proceedings on October 22, 1936. The judgment dismissing the bankruptcy proceedings was affirmed by the Circuit Court of Appeals on the sole ground that the petitioner was not a farmer because it was not engaged in farming in fact and also was precluded from doing so because of the forfeiture of its corporate franchise (*McLaughlin v. Bank*, 94 Fed. (2d) 491).

The Bank then waited until the expiration of the seven-year lease and commenced a new action in unlawful detainer against the individual lessees, the stockholders and officers of petitioner, on the ground that they were holding over after the expiration of their lease. The defendants denied possession and affirmatively alleged that they had surrendered possession of the 600-acre parcel to the petitioner on December 1, 1938, which was the day following the expiration of the seven-year lease (*Bank of America v. McLaughlin*, 40 Cal. App. (2d) 620, 105 Pac. (2d) 607).

The Bank then commenced an action in unlawful detainer against petitioner, in which action the petitioner sought to attack the regularity of the foreclosure proceedings and the validity of the foreclosure sale on various grounds, all of which it sought to re-litigate in the court below (R. 113-123). At the trial the Bank introduced in evidence the deed of trust and trustee's deed to prove a *prima facie* case. It also introduced the judgment rolls and transcripts in two previous cases wherein the regularity of the foreclosure proceedings and the validity of the fore-

closure sale were in issue and passed upon, to-wit, the judgment rolls and transcripts in the deficiency action and the previous bankruptcy proceedings filed by petitioner. All evidence offered by petitioner seeking to attack the foreclosure sale was excluded by the state court. No other evidence was offered by the petitioner. A directed verdict was rendered in favor of the Bank, and judgment was accordingly entered on March 28, 1939 (R. 110-112). This judgment was affirmed on September 16, 1940 (*Bank v. McLaughlin*, 40 Cal. App. (2d) 620, 105 Pac. (2d) 607). Petitioner applied for certiorari, making substantially the same contention as it makes in its present application, which was denied on May 5, 1941 (*McLaughlin v. Bank of America*, 61 S. Ct. 958).

During the pendency of the last action, W. J. Kirkpatrick, an assignee of the bank, filed suit to renew the deficiency judgment. On March 22, 1939, the petitioner filed an answer and cross-complaint *seeking to set aside the foreclosure sale* and deficiency judgment (R. 29, 39, 185-186). The Bank filed a demurrer to the cross-complaint, which demurrer was sustained without leave to amend, and judgment was thereupon entered (R. 39, 61-62). The petitioner took an appeal and stipulated that in the event the District Court of Appeal affirmed the last unlawful detainer action, the appeal should be dismissed. Upon affirmance of the last unlawful detainer action, the appeal was dismissed (*Kirkpatrick v. M. Laughlin etc. Co.*, 41 Cal. App. (2d) 954, 107 P. (2d) 99).

After this proceeding under section 75 of the Bankruptcy Act had been dismissed by the Federal District

Court, the petitioner commenced an action to quiet title to all the property covered by the deed of trust and for declaratory relief. That case was tried on April 22, 1941, and judgment was subsequently entered in favor of the Bank on May 6, 1941. A certified copy of the judgment roll in that case was filed with the Circuit Court. That judgment has become final.

The only contention made by the petitioner is that the foreclosure sale was not validly held. This contention, as petitioner concedes, has been made by it time and time again, and on each occasion the contention has been determined against it. The same contention advanced here was involved in and adjudicated (1) in the deficiency action, (2) in the former proceeding filed by the appellant under section 75 of the Bankruptcy Act, (3) in the last unlawful detainer case, (4) in the action to renew the deficiency judgment, (5) in the action to quiet title and for declaratory relief filed by it after the dismissal of this proceeding by the court below, and (6) by the court below.

There must be an end to litigation. Clearly, petitioner has had its day in court on many, many occasions

Petitioner claims that the Circuit Court erred in affirming the judgment of dismissal on the ground that it had not established that it was a farming corporation or bona fide engaged in farming, in view of the fact that it was precluded from making such a showing by the special master. This contention is erroneous on two scores. First of all, it was not precluded from making any such showing. The record clearly

shows that the petitioner introduced certain evidence into the record and made no attempt to introduce any other evidence. The special master did not fail to admit any evidence which petitioner offered. The Bank introduced evidence to show that it was the owner of the property and that petitioner was trespassing thereon, and the special master so found, which findings were adopted and approved by the Distric Court. Petitioner offered certain evidence in rebuttal and rather than submit to the decision of the special master on the question of whether or not petitioner had any interest in the property, elected to be bound by the appeals taken by it from the two state court judgments, which were then pending on appeal. It offered no evidence to show that it was a farming corporation within the meaning of the act. It offered no evidence to show that it was actually bona fide engaged in farming practice. Surely this did not amount to depriving petitioner of a hearing, as it contends in its petition for certiorari. Petitioner elected to agree to the granting of one of the alternative prayers in the Bank's petition, that is, that the Bank be permitted to proceed with the prosecution of the state court actions to final judgment. This was not only the proper but the only sensible solution of the matter then pending before the special master. Secondly, the statement is erroneous inasmuch as it misconstrues the opinion of the Circuit Court. The opinion of the Circuit Court did not affirm the judgment of dismissal on the ground that petitioner had failed to show that it was the owner of the farming property. The opinion of the Circuit Court was based upon the ground that the

petitioner had failed to show that it was a farming corporation within the meaning of the act and that it was actually bona fide engaged in farming practice within the meaning of the act. *Petitioner does not even discuss this point in its petition for certiorari.*

In any event, the Bank had established a case in favor of its petition to dismiss. The question of whether or not petitioner could attack the validity of the foreclosure sale must be determined by the state law. The law of the State of California clearly precludes such an attack (*Bank of America v. McLaughlin,* 40 Cal. App. (2d) 620, 105 Pac. (2d) 607).

Petitioner also contends that the court below did not have jurisdiction to pass upon the questions presented by the bank's petition until there had been a hearing before the Conciliation Commissioner and report to the District Court. The answer to this contention is clear. Questions relating to the jurisdiction of the court may be raised at any time. (*In re Boehme,* D. C. Mont., 1941, 41 Fed. Supp. 426; 15 *C. J.* 851, Sec. 170; 21 *C. J. S.* Sec. 113.)

ARGUMENT.

A. There is no Reason for Granting a Writ of Certiorari.

The petition for certiorari is requested on the ground that the Circuit Court held that petitioner was not a farming corporation or a farmer because it was not the owner of the property described in its schedules and that inasmuch as the special master had prevented it from proving that it owned the property,

certiorari should issue from this court. That is pure window dressing. The Circuit Court rendered no such opinion. The Circuit Court held that the burden was upon petitioner to show the jurisdictional facts—that it was a farming corporation and bona fide engaged in farming and that in view of the fact that it did not so prove or even attempt to prove before the special master the Bankruptcy Court acquired no jurisdiction over it or its property. The true decision of the Circuit Court is not attacked by petitioner.

Surely it is not the province of this court to pass upon academic questions. This is exactly what petitioner requests the court to do.

B. The Concurrent Decisions of the Courts Below Were Correct.

In order to sustain the contentions of petitioner it would be necessary that the Federal Court sit in review of the courts of last resort of the State of California as to questions of property law of that state. Petitioner's complaint is that the proceedings leading up to a foreclosure sale held in 1932 were irregular in certain respects. The state courts in four separate actions have determined that the foreclosure proceedings were regular in all respects and the sale validly held. The state courts have also held that petitioner is estopped from contending otherwise. The Federal Court in California has twice affirmed these rulings. The sole question presented is whether this issue should be litigated anew.

As we have pointed out, the petition for certiorari filed by the debtor presents an anomalous situation. It

attacks the opinion of the Circuit Court of Appeals, but in doing so builds a straw man. Its complaint is based solely upon the ground that the Circuit Court affirmed the judgment of dismissal on the ground that the petitioner had not shown that it was a farming corporation and a farmer within the meaning of the act, notwithstanding the fact that it was precluded from making such a showing by the special master. The Circuit Court made no such ruling, and the special master did not preclude petitioner from making any showing that it desired to make. The Circuit Court held that there was an entire absence of any showing that petitioner was a farming corporation within the meaning of the act or that it was actually bona fide engaged in farming practices within the meaning of the act. The true decision of the Circuit Court petitioner does not attack.

I.

THERE WAS NO SHOWING THAT PETITIONER WAS A FARMING CORPORATION OR ACTUALLY AND BONA FIDE ENGAGED IN FARMING PRACTICES WITHIN THE MEANING OF SECTION 75 OF THE BANKRUPTCY ACT.

The Circuit Court held that the burden was upon petitioner to show that it was a farming corporation and actually and bona fide engaged in farming, and inasmuch as it had failed to sustain that burden the District Court had properly dismissed the proceedings instituted by it.

Petitioner does not complain of that ruling. It contends that the Circuit Court decision was based upon

the ground that it had failed to show that it owned farming property and that inasmuch as it was prevented from so showing by the special master and the District Court, the opinion of the Circuit Court was erroneous. It suffices to state that the Circuit Court did not so hold.

There is no evidence in the record that petitioner was a farming corporation or bona fide engaged in farming when it filed its petition under section 75 of the Bankruptcy Act. On the contrary, the evidence clearly shows that it was trespassing on the Bank's property.

Even if we were to assume that petitioner's construction of the opinion of the Circuit Court was correct, a reading of the record (R. 146-184) will immediately disclose that it was not deprived of a hearing. No evidence that it offered was excluded by the special master. The fact is that with the exception of two judgment rolls, *which it did not designate as portions of the record upon appeal,* it offered no evidence in opposition to the petition filed by the Bank or to sustain the jurisdictional issue raised. It elected to abide by the result of the appeals it had taken from two state court judgments that had been rendered against it, in both of which proceedings the validity of the foreclosure sale admittedly was involved.

After these appeals were finally decided against it, it unsuccessfully sought to again litigate the matter on the theory that no hearing had been conducted by the special master and no evidence had been introduced before him (R. 77; 85; 90-91; 92; 94-95; 98; 100; 103).

As we have pointed out, a hearing was in fact held and abundant evidence was introduced which supports each and every finding made by the special master. Petitioner persisted in this error in stating its points to be relied upon on its appeal to the Circuit Court (R. 131). In fact, it was not until it petitioned this court for certiorari that it abandoned its contentions that there had been no evidence introduced before the special master to support the findings made by him.

II.

PETITIONER WAS NOT A FARMER INASMUCH AS IT DID NOT OWN AND WAS NOT LAWFULLY POSSESSED OF ANY FARMING PROPERTY.

It is clear that the laws of the State of California are determinative of the question of the validity of the foreclosure sale and the lawfulness of petitioner's possession of a small portion of the property involved.

The question of whether or not petitioner owned or was lawfully possessed of any farming property so as to permit it to obtain relief under section 75 of the Bankruptcy Act depends upon whether or not the foreclosure sale actually took place in 1932. That issue, as we have demonstrated, has been determined against petitioner in five separate actions or proceedings, exclusive of this proceeding.

Petitioner states that the decision of the court below "rested for the most part upon the finding of said state court that the matter of the validity of the Bank's title to said property had become *res judicata*

in the previous proceeding of petitioner under" section 75 of the Bankruptcy Act. It is true that the opinion of the state court was based *in part* upon that ground. However, there were several other independent grounds for its decision, any one of which, standing alone, was sufficient to support its determination that the foreclosure sale was validly held and that the petitioner was estopped from attacking the regularity and validity of said foreclosure sale.

In discussing the question of whether or not it was entitled to relief in this proceeding, petitioner contends

(1) that the deficiency judgment and the judgment renewing the same did not constitute an estoppel against petitioner as to the validity of the foreclosure sale;

(2) that the findings and judgment in the previous bankruptcy proceeding filed by the petitioner did not estop it from attacking the validity of the foreclosure sale;

(3) that the judgment in the last unlawful detainer case did not estop appellant from attacking the validity of the foreclosure sale.

We shall briefly discuss these points in the order stated, and in doing so shall not argue the points at any length because of the fact that each question was argued before the District Court of Appeal of the State of California in the last unlawful detainer case and decided by it. All the authorities cited and contentions made by the appellant in its brief filed on this appeal were made before the District Court of Appeal in the last unlawful detainer case and each of those

contentions were decided against it by the said District Court of Appeal. This court as we have stated denied certiorari in that case.

A. Both the Deficiency Judgment and the Judgment Renewing the Deficiency Judgment Constitute a Conclusive Estoppel as Against Petitioner in its Attempt to Again Litigate the Validity of the Foreclosure Sale.

Petitioner contends that the deficiency judgment was not *res judicata* because of the fact that the pleadings, findings and judgment in that case do not show on their face that the question of the validity of the foreclosure sale was an issue in or had actually been determined in that case. This same contention was made by the petitioner in the last unlawful detainer case and the same authorities relied upon in its brief filed with this court were there cited.

The District Court of Appeal stated (40 Cal. App. (2d) 620, 629-633) that the reporter's transcript in the deficiency action, which was also introduced in evidence in the hearing before the special master (R. 148) but was omitted from the printed record (R. 198-199) clearly showed that the question of whether or not the deed of trust had been foreclosed was an issue in that case and was actually decided by the court. The petitioner was represented in court at the trial of the deficiency action by its counsel and its President, Patrick McLaughlin (R. 191-197).

In the action to renew the deficiency judgment, the petitioner sought to set aside the deficiency judgment

and the foreclosure sale on the ground that no foreclosure sale had actually been held and that therefore the court did not have jurisdiction to entertain the action for the renewal of the deficiency judgment and also sought to quiet its title to the property (R. 39). No attack was made on the ground of extrinsic fraud, and the Bank's demurrer to the cross-complaint was sustained without leave to amend. After taking an appeal, the petitioner stipulated that the appeal should be dismissed in the event the judgment in the last unlawful detainer case was affirmed. The appeal was dismissed on November 16, 1940. (*Kirkpatrick v. McLaughlin etc. Co.*, 41 Cal. App. (2d) 954, 107 P.(2d) 99.)

B. The Judgment of Dismissal in the Former Proceedings Filed by Petitioner Under Section 75 of the Bankruptcy Act Constitutes a Conclusive Estoppel Against Petitioner in its Attempt to Again Attack the Validity of the Foreclosure Sale.

The District Court of Appeal in the last unlawful detainer action passed upon this contention of petitioner, in which case the same arguments and the same authorities were made and cited by petitioner. In that case the court held (40 Cal. App. (2d) 620, 625-629) that the Bankruptcy Court was presented with two questions, both of which went to its jurisdiction. First, was the petitioner actually bona fide engaged in farming; and secondly, was the petitioner the owner or lawfully possessed of any farming property to entitle it to invoke the provisions of section 75 of the Bankruptcy

Act. The District Court of Appeal further held that the decision of the Bankruptcy Court was *res judicata* on both grounds notwithstanding the fact that the Circuit Court of Appeals affirmed the judgment of dismissal on the sole ground that the petitioner was not engaged in farming.

Petitioner contends in its brief filed in this case, as it did before the Circuit Court, the District Court of Appeal and in its application for certiorari before this court from the judgment against it in the unlawful detainer case, that in view of the fact that the petitioner was not a farmer, the Bankruptcy Court did not have jurisdiction to decide any other issue presented to it. This argument loses sight of the fact that each point decided by the Bankruptcy Court went to the question of whether or not the petitioner was a farmer within the meaning of the Bankruptcy Act and whether or not the Bankruptcy Court had jurisdiction. Obviously, one who is not the owner or lawfully possessed of farming property is not bona fide engaged in farming, particularly where the alleged farmer does not profess to be farming any other property. As a matter of fact, the petitioner was trespassing on the Bank's property. (*Societa Italiana Di Mutua Beneficenza v. Burr* (C. C. A. 9), 71 F. (2d) 496.)

The state court's opinion to the effect that the question of whether the petitioner was the owner or legally possessed of farming property was equally jurisdictional is amply supported by the authorities. In *Wright v. Union Central Life Insurance Co.*, 304 U. S. 502, 508-509, 58 S. Ct. 1025, 1029-1030, this court stated:

"With the delivery of the deed, prior to any effective extension of the period of redemption, the purchaser's rights, flowing from the judicial sale, *were no longer affected by the court's jurisdiction of petitioner* and petitioner's estate under the Bankruptcy Act. Nothing in section 75 as it now stands indicates any intention that the Bankruptcy Courts assume control over land not previously within the jurisdiction of a Bankruptcy Court, and already completely divorced from any title of the debtor." (Italics ours.)

In *Union Joint Stock Land Bank v. Byerly*, 310 U. S. 1, 10-11, 60 S. Ct. 773, 777-778, 84 L. Ed. 1041, where the debtor as did the petitioner here had taken an appeal from the state court judgment the court stated:

"Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor. * * *

It is said that, even where title has passed from the mortgagor in foreclosure proceedings before the filing of the petition, the debtor should be, if he so requests, adjudicated a bankrupt so that a trustee may, if so advised, challenge the validity of the sale. Here, however, there is no suggestion of any infirmity in petitioner's title save that the sale was made in violation of the prohibitions of the bankruptcy act. But that sale was made under leave of the bankruptcy court and it was within the State court's jurisdiction, when no bankruptcy

proceeding was pending, to confirm the sale and order delivery of a deed. If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding. The fact is that the debtor appealed from the confirmation of the sale to the Court of Appeals of Madison County, Ohio, which affirmed the decree of the Common Pleas Court. An issue of fraud alleged to have been practiced upon the debtor to obtain his withdrawal of his original bankruptcy proceeding was there finally decided against him."

To the same effect:

Bastian v. Erickson, C. C. A. 10, 114 Fed. (2d) 338, 340-41;
In re Weis, D. C. Iowa, 10 Fed. Supp. 227, 229;
In re Knauff, D. C. Cal., 10 Fed. Supp. 786;
In re Randall, D. C. Penn., 20 Fed. Supp. 470;
In re Chrisman, D. C. Cal., 35 Fed. Supp. 282;
In re Bochme, D. C. Mont., 41 Fed. Supp. 426.

It is to be remembered that the petition filed by petitioner in the former proceedings under section 75 of the Bankruptcy Act alleged that it was a farming corporation, which allegation was sufficient to confer jurisdiction on the Bankruptcy Court until the facts proved otherwise. Consequently, a hearing on the issue of fact raised by the petition to dismiss filed by the Bank was necessary in order to determine whether or not petitioner was in fact a farmer and entitled to invoke the provisions of the act. Throughout that proceeding the petitioner claimed that it was a farmer and in fact so claimed before the Circuit Court of

Appeals. Consequently it cannot be claimed that the Bankruptcy Court lacked jurisdiction until such time as that court had determined the factual questions involved.

As we have stated, the District Court of Appeal held that the decision by the Bankruptcy Court on both questions was *res judicata* notwithstanding that on appeal the Circuit Court of Appeals affirmed the judgment of dismissal on the sole ground that the petitioner was not actually bona fide engaged in farming and could not farm in view of the fact that it had not paid its franchise tax. The District Court of Appeal held that a general affirmance of a judgment, notwithstanding the fact that the affirmance is limited to but one of the many grounds decided by the court below, nevertheless renders the judgment of the court below *res judicata* on each and every issue decided by it. The opinion by the District Court of Appeal in this respect is likewise amply supported by the authorities.

34 *C. J., Judgments*, 773;

State v. City of Cleveland, 60 O. App. 295, 22 N. E. (2d) 223, 226;

People v. Skidmore, 27 Cal. 287, 292-93;

Russell v. Russell, C. C. A. 3, 134 Fed. 840, cert. denied 198 U. S. 584, 49 L. Ed. 1173, 25 S. Ct. 802.

However, as we have stated, the question of whether or not the state court's decision in this respect was or was not correct is entirely beside the point. There were several other ample grounds for the decision by the District Court of Appeal in the last unlawful

detainer action to support its opinion that petitioner was estopped from seeking to attack the validity of the foreclosure sale. Those grounds of the court's decision the petitioner does not attack except to state that the issue of title was not there involved and that the decision was erroneous. Those points will be discussed later.

C. The Foreclosure Sale Was Not Conducted by an Unauthorized Person and Was Valid in All Respects.

In contending that the foreclosure sale was illegally held, petitioner blows both hot and cold. It contends throughout its brief that the Bankruptcy Court in the former proceedings instituted by the appellant under section 75 had no jurisdiction to decide any issues after it had once determined that the petitioner was not a farmer, yet it then seizes upon a portion of an isolated finding by the special master, which it contends the special master had no jurisdiction to make, and contends that the sale was illegal because the person who conducted the sale had not previously been properly authorized to do so.

The record in the former bankruptcy proceeding was introduced for the sole purpose of showing that the issues as to the title to the property had been passed upon in that proceeding and that the determination by the court in that proceeding constituted a conclusive estoppel against appellant (R. 151-152).

It is true that the special master there found that the sale had been conducted by one who had not previously been specifically authorized to do so, but the

special master went on to find *in the same finding* that the acts in conducting the sale were subsequently ratified by the trustee under the deed of trust (R. No. 8235, p. 32). The petitioner contends that the special master erred in making the latter portion of that finding.

Eliminating for a moment the question of whether or not the special master had the power or jurisdiction to make the finding, which petitioner must do in order to make this contention, it is obvious that whether or not the special master erred in making his finding that the holding of the sale was subsequently ratified by the trustee under the deed of trust did not go to the jurisdiction of the special master but would at best be but an error in judgment which could only be cured by a direct attack by appeal.

Union Joint Stock Land Bank v. Byerly, 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041;

Buttars v. Utah Mortgage Loan Corp. (C. C. A. 10), 116 F. (2d) 622;

Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329;

Stoll v. Gottlieb, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

The law of the State of California controls as to whether or not the trustee's sale was valid. In the last unlawful detainer case (40 Cal. App. (2d) 620, 633), the court held that under the laws of the State of California the appellant was estopped from claiming "that no sale was in fact made" inasmuch as the

provisions of the deed of trust made the recitals in the trustee's deed to the effect that a sale was actually conducted conclusive upon appellant.

It is also the law of the State of California that even though the sale had been conducted by one who was not previously specifically authorized to do so, such act in conducting the sale is ratified by the subsequent execution of the trustee's deed.

Harris v. Seidell, 1 Cal. App. (2d) 410;
Orloff v. Pece, 134 Cal. App. 434;
Kraemer v. Coward, 2 Cal. App. (2d) 506;
Bertschmann v. Covell, 205 Cal. 707;
Civil Code, Sec. 2307.

D. The Judgment in the Last Unlawful Detainer Action Constitutes a Conclusive Estoppel Against Petitioner's Present Attempt to Attack the Validity of the Foreclosure Sale.

Petitioner's argument that the judgment in the last unlawful detainer action is not conclusive against it is predicated upon the grounds that the state court erred in holding that the judgment in the former bankruptcy proceeding filed by appellant was *res judicata.*

As we have pointed out, however, there were several other grounds for the decision by the District Court of Appeal in the last unlawful detainer action, any one of which, standing alone, is sufficient to support its decision that the petitioner is estopped from attacking the validity of the foreclosure sale. Those independent grounds of the state court's decision were: First. That the recitals in the trustee's deed

as to the regularity of the foreclosure proceedings and the fact that the foreclosure sale was actually conducted were conclusive upon petitioner (40 Cal. App. (2d) 620, 633); Second. That the judgment in the deficiency action was *res judicata* as to the issue that the real property had been foreclosed (40 Cal. App. (2d) 620, 629, 633); and Third. That the judgment in the former proceedings under section 75 of the Bankruptcy Act constituted a conclusive estoppel against petitioner from contending that the foreclosure sale was not regularly held (40 Cal. App. (2d) 620, 625-29).

We have heretofore discussed the question of whether the third ground of the state court's decision was correct or not. However, the question of whether or not the District Court of Appeal erred in its decision on this point is purely academic inasmuch as it held that under the laws of the State of California the petitioner was estopped from attacking the validity of the foreclosure sale on several other grounds. The decision of the state court has become final and it conclusively stablished that the laws of this state preclude the appellant from attacking the validity of the foreclosure sale. That decision, as we have shown, is binding upon this court.

Erie Railroad Co. v. Tompkins, supra.

The other contention made by petitioner is that the action did not involve the question of title. The Bank's complaint in that action pleaded that it owned the property (R. 114) and petitioner's answer denied the allegation (R. 119). Regardless of this, admittedly

petitioner's only claim to the property is that no valid foreclosure sale was held. That issue did not have to be decided in an action to quiet title to be conclusive against petitioner. No claim is made that the issue as to the validity of the foreclosure sale was not there determined—merely that the action did not involve the question of title but merely the right to possession. We do not think further discussion necessary.

E. The Judgment in the Quiet Title Action Filed by the Petitioner is Conclusive of All Issues Raised by it in This Proceeding.

Petitioner does not mention the action to quiet title filed by it, apparently because it was filed and decided after the lower court had dismissed this proceeding. However, a certified copy of the judgment roll was filed with the Circuit Court. Hence, the issues here raised by petitioner have been decided against it in an action to quit title commenced by it.

III.

THE STIPULATION SIGNED BY COUNSEL FOR ALL PARTIES AGREEING THAT THE DECISION IN THE LAST UNLAWFUL DETAINER CASE AND IN THE KIRKPATRICK ACTION SHOULD BE CONCLUSIVE UPON THE PARTIES WAS PROPER AND DID NOT TRANSCEND THE POWERS OF THE COURT.

The Bank filed a petition praying for three alternative orders: that the bankruptcy proceedings be dismissed; that the real estate covered by the deed of trust be stricken from the schedules; or for leave to

further prosecute certain state court actions (R. 26-35). After the Bank had completed its case in support of its petition, Mr. Aram, the attorney for certain unsecured creditors, suggested that the third alternative of the Bank's petition be granted (R. 179-183) and after a recess to permit the then counsel for petitioner to discuss the question of whether or not the stipulation should be entered into (R. 108-109, 183) petitioner's counsel agreed to the stipulation. All counsel then proceeded to Mr. Aram's office to draw the stipulation, whereupon it was signed and filed with the conciliation commissioner (R. 109).

Petitioner's present counsel objected to the stipulation before the District Court on the sole ground that it had deprived petitioner of a hearing and that the matter should be re-referred to the special master for a hearing on the merits (R. 94-106). The facts are that a formal hearing was held and evidence was introduced that supports each and every finding made by the special master (R. 146-183) and that the president of the petitioner corporation actually had agreed to the stipulation in question (R. 108-109; 183).

However, whether or not the stipulation was entered into, it is clear that the Bankruptcy Court had the power to permit questions as to title to be litigated in the state court, and as this court has stated properly does so when complicated questions of state law are involved.

Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628;

Ex parte Baldwin, 291 U. S. 610, 54 S. Ct. 551.

Petitioner claims that the Bankruptcy Court had summary jurisdiction to determine the question of title to the entire 6640 acres. This is another academic point inasmuch as the Bank personally appeared in the bankruptcy proceeding and therefore gave the Bankruptcy Court jurisdiction over its person. The fact remains, however, that the bankrupt had possession of but 600 acres of the property at the time it instituted bankruptcy proceedings, which it occupied as a trespasser, and the court at no time acquired summary jurisdiction of the remaining 6040 acres but for the Bank's appearance.

IV.

PETITIONER WAS GUILTY OF LACHES, AND ANY CLAIM THAT IT HAS TO THE PROPERTY IS BARRED BY THE STATUTE OF LIMITATIONS.

The special master in the first proceeding filed by the petitioner under section 75 of the Bankruptcy Act held that the petitioner had been guilty of laches, and its claim was barred by the statute of limitations (R. No. 8385, p. 31) and the same findings were made by the special master in this case (R. 62).

The evidence in the present proceeding shows that no proceeding was filed by the appellant seeking to attack the validity of the foreclosure sale until it filed its cross-complaint in the suit to renew the deficiency judgment, which was more than seven years after the foreclosure sale had taken place (R. 166-175). The record further shows that in the first two unlawful detainer actions the petitioner admitted the regularity

of the foreclosure sale and did not question the title of the Bank, but as a matter of fact the stockholders and officers of the appellant claimed as lessees a small portion of the property formerly covered by the deed of trust. In fact, in the first unlawful detainer action petitioner disclaimed as to 6040 acres of the 6640 involved (R. 189). The record further shows that 6640 acres of the property originally covered by the deed of trust was voluntarily surrendered to the Bank immediately after the foreclosure sale and that the petitioner has not been in possession of it and has not made any attempt to obtain possession of those 6640 acres for a period of more than seven years after the foreclosure sale took place. The record further shows that the Bank has paid the taxes on the property ever since the foreclosure sale (R. 47).

V.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
December 17, 1941.

Respectfully submitted,
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